

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re: Victor Okafor,

Debtor.

Case No. 04-75291
Chapter 7
Hon. Marci B. McIvor

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Pam Radzinski,

Plaintiff,

Adv. No. 05-4974
Chapter 7
Hon. Marci B. McIvor

v.

Victor Okafor,

Defendant.

_____ /

OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on defendant/debtor Victor Okafor's Motion for Summary Judgment. Plaintiff, Debtor's divorce attorney, filed a two count Adversary Complaint against Debtor seeking to have a state court judgment (for attorney fees) against Debtor held non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) (fraud/false pretenses) and 523(a)(2)(B)(use of false statement in writing). For the following reasons, Defendant's Motion is granted and Plaintiff's Complaint is dismissed.

Background

Plaintiff attorney Pamela Radzinski was retained by debtor Victor Okafor to represent him in a divorce/custody matter in 2000. On December 2, 2004, Plaintiff obtained a state court judgment against Debtor for \$14,850 in attorney fees related to that

representation. Debtor filed a chapter 7 bankruptcy petition on December 16, 2004.

Plaintiff filed the complaint in the present adversary proceeding on March 28, 2005.

Plaintiff contends that while Defendant paid \$10,757 in fees prior to the state court judgment (those fees were paid between January, 2000 and October, 2002), an additional \$15,000 is owed for work completed through January, 2004, when the divorce/custody matter concluded. According to Plaintiff, Debtor repeatedly promised to pay for the work (see *e.g.* check dated October 2, 2002 for \$1,000 from Debtor to Plaintiff, with the notation “first of five installment payments”, Pl. Ex. A), but upon receiving the bill in January, 2004, refused to pay. Plaintiff’s brief is confusing. She asserts that Debtor made many statements “throughout her representation” that he would pay her, but that “these statements were false and supposedly the Defendant was insolvent at the time the statements were made.” (Plaintiff’s Brief ¶¶ 7,8). However, she then notes that “within 90 days to one year prior to [his] filing for bankruptcy [Debtor] paid an attorney [\$5,000] to represent him at trial against [Plaintiff]”, implying that Debtor was not insolvent. (Plaintiff’s Brief ¶ 14).

Debtor contends that he has paid Plaintiff all of the money he owes her and “[t]hat [Plaintiff’s] behavior and continued threats to withdraw caused [him] to make the promises to pay further amounts demanded by [Plaintiff].” Debtor believes that any issues of fraud or false pretenses were determined by the state court and that those issues cannot be retried in this Court.

Standard for Summary Judgment

Fed. R. Civ. P. 56(c) for summary judgment is incorporated into Fed. R. Bankr. P.

7056(c). Summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." Celotex, 477 U.S. 317, 323. A "genuine" issue is one where no reasonable factfinder could return a judgment in favor of the non-moving party. Berryman v. Reiger, 150 F.2d 561, 566 (6th Cir. 1998) (citing Anderson, 447 U.S. at 248). Once the movant meets this burden, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts. If the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the non-moving party, the motion should be granted." Cox v. Kentucky Dept. of Transportation, 53 F.3d 146, 149-50 (6th Cir. 1995) (internal quotation marks and citation omitted).

Analysis

Count I: Non-dischargeability Based on Fraud under 523(a)(2)(A)

Section 727 of the Bankruptcy Code provides that a debtor may obtain a general discharge from all debts that arose before the order for relief. 11 U.S.C. § 727(b).

However, there are exceptions for certain obligations, including debts for money obtained by fraud. 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) provides:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . .

To prevail on a claim under 523(a)(2)(A), a plaintiff must show that: (1) [T]he debtor obtained money or a refinancing of credit through a material misrepresentation that at the time the debtor knew was false or that he made with reckless disregard for the truth; (2) the debtor intended to deceive; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 280 (6th Cir. 1998).

The purpose of section 523(a)(2) is to prevent debtors from retaining the benefits of property obtained through fraud. *In re Omegas Group, Inc.*, 16 F.3d 1443, 1451 (6th Cir. 1994). Plaintiff must show each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Even so, the court must construe all of the exceptions to discharge strictly, and must give the benefit of the doubt to debtor. *Rembert*, 141 F.3d at 281.

Intent, under *In re Rembert*, is measured subjectively. 141 F.3d at 281. A debtor intends to deceive a creditor “when the debtor makes a false representation which the debtor knows or should have known would induce another to advance goods or services to

the debtor.” *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001). Fraudulent intent requires an actual intent to mislead, which is more than mere negligence. . . A ‘dumb but honest’ [debtor] does not satisfy the test.” *Palmacci v. Umpierrez*, 121 F.3d 781, 788 (1st Cir., 1997)(citations omitted). A debtor’s fraudulent intent,

may be inferred from the totality of the circumstances. The bankruptcy court must consider whether the totality of the circumstances ‘presents a picture of deceptive conduct by the debtor which indicates an intent to deceive the creditor.’ The court may consider not only the debtor’s conduct at the time of the representations, but may consider subsequent conduct, to the extent that it provides an indication of the debtor’s state of mind at the time of the actionable representations.

Wolf v. McGuire (In re McGuire), 284 B.R. 481, 492 (Bankr. D. Co. 2002)(quoting *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (10th Cir. BAP 2000)(citations omitted). “A creditor can present proof of surrounding circumstances from which a [c]ourt can infer a dishonest intent.” *Commercial Bank and Trust v. McCoy (In re McCoy)*, 269 B.R. 193, 199 (Bankr. W.D. Tenn. 2001).

As explained by the court in *Haney v. Copeland (In re Copeland)*, 291 B.R. 740 (Bankr. E.D. Tenn. 2003):

Proving the Debtor’s intent to defraud is similar to proving the Debtor’s knowledge and/or recklessness as to the falsity of the representations made. Because intent is a purely subjective question, the court must examine the totality of the Debtor’s actions to determine if she possessed the requisite intent to deceive the Plaintiffs. Any benefit of the doubt must be resolved in favor of the Debtor, as § 523(a)(2) is strictly construed in her favor. *XL/Datacomp, Inc. v. Wilson (in re Omegas Group, Inc.)*, 16 F.3d 1443, 1452 (6th Cir. 1994).

Haney v. Copeland (In re Copeland), 291 B.R. 740, 760 (Bankr. E.D. Tenn. 2003).

In the present case, Debtor admits that Plaintiff’s continued threats to “withdraw

caused [Debtor] to make the promises to pay the further amounts demanded by [Plaintiff].” (Defendant’s Motion, ¶ 8). This statement alone, even if true, does not establish “intent to deceive” as required under § 523(a)(2)(A). Even if construed to show such intent, Plaintiff must show that she reasonably relied on Debtor’s promises of payment. Given that Plaintiff represented Debtor for two years without receiving additional payment (Debtor’s last check to Plaintiff was dated October, 2002 and Debtor’s divorce case concluded in December, 2004), such reliance on those verbal promises is not reasonable.

Rather than a § 523(a) issue of fraud, this case appears to be a basic breach of contract. Debtor and his divorce attorney had an agreement regarding fees payable for legal representation and Debtor breached that agreement. Debts arising from breach of contract are dischargeable under the Code. Because Plaintiff has proffered no evidence from which the Court could reasonably infer fraudulent intent and Plaintiff’s reliance on Debtor’s promises to pay was not reasonable under the circumstances, Defendant’s Motion for Summary Judgment is granted as to Count I of the Complaint and Count I is dismissed.

Count II: Non-dischargeability Based on Fraudulent Writing under § 523(a)(2)(B)

Section 523(a)(2)(B) excepts from discharge debts incurred by use of a false statement in writing. To prevail on a § 523(a)(2)(B) claim, a plaintiff must establish the following elements regarding the writing:

- (i) that is materially false; (ii) respecting the debtor’s or an insider’s financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with the intent to deceive.

See Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1166 (6th Cir. 1985).

A document that is “written, signed, adopted or used by the debtor” qualifies as a statement in writing under this section. *Insouth Bank v. Michael (In re Michael)*, 265 B.R. 593, 598 (Bankr. W.D. Tenn. 2001).

Under the first element, a written statement is materially false if the information in it “offers a substantially untruthful picture of the financial condition of the debtor that affects the creditor’s decision to extend credit.” *Id.*, citing *In re Bogstad*, 779 F.2d 370, 375 (7th Cir. 1985). The second element requires that the statement refer to the debtor’s financial condition.

The United States Supreme Court has held that a check is not a statement of financial condition. *Williams v. United States*, 458 U.S. 279 (1982). While *Williams* was a criminal case, not a bankruptcy case, its reasoning is sound:

Although petitioner deposited several checks that were not supported by sufficient funds, that course of conduct did not involve the making of a ‘false statement,’ for a simple reason: **technically speaking, a check is not a factual assertion at all, and therefore, cannot be characterized as ‘true’ or ‘false.’** Petitioner’s bank checks served only to direct the drawee banks to pay the face amounts to the bearer, while committing petitioner to make good the obligations if the banks dishonored the drafts. Each check did not, in terms, make any representation as to the state of petitioner’s bank balance. As defined in the Uniform Commercial Code, a check is simply ‘a draft drawn on a bank and payable on demand,’ § 3-104(2)(b), which ‘contain[s] an unconditional promise or order to pay a sum certain in money,’ § 30104(1)(b).

Williams, 458 U.S. at 284-285 (emphasis added). *Williams* has been applied by bankruptcy courts in the context of § 523(a)(2)(b). *See Doug Howles’s Paces Ferry Dodge, Inc. v. Etheridge (In re Etheridge)*, 80 B.R. 581, 588-589 (Bankr. M.D. Ga, 1987).

The third element of a § 523(a)(2)(B) requires the plaintiff/creditor to establish reasonable reliance on the written statement. Reasonable reliance is not defined in the Bankruptcy Code. Case law generally holds that it is determined objectively based on the totality of the circumstances. *In re Michael*, 265 B.R. at 598.

The determination of the reasonableness of the creditor's reliance on a false statement in writing is judged by utilizing such factors as:

- whether there had been previous business dealings between the debtor and the creditor;

- whether there were any warnings that would alert a reasonably prudent person to the debtor's misrepresentations;

- whether a minimal investigation would have uncovered the inaccuracies in the debtor's financial statements; and

- the creditor's standard practices in evaluating creditworthiness and the standards or customs of the creditor's industry in evaluating creditworthiness.

Id.

The fourth element of § 523(a)(2)(B) requires that the debtor make or publish the statement with "intent to deceive."

The standard. . . is that if the debtor either intended to deceive the Bank or acted with gross recklessness, full discharge will be denied. . . . That is, the debtor must have been under some duty to provide the creditor with his financial statement; but full discharge may be disallowed if the debtor either intended the statement to be false, or the statement was grossly reckless as to its truth.

Martin v. Bank of Germantown (In re Martin), 761 F.2d 1163, 1166 (6th Cir.

1985)(citations omitted).

In the *Martin* case, the bankruptcy court inferred an intent to deceive on the part of a debtor where in a financial statement to the lender he misrepresented that his assets exceeded his liabilities by a 2 to 1 margin, when in fact the debtor's liabilities exceeded his assets by a 3 to 1 ratio. *Id.* The *Martin* Court agreed and explained that "[The debtor] intentionally communicated the false statement to the Bank with the expectation that the

Bank would rely on it, and he cannot now be heard to say that he did not intend the Bank to continue this reliance.” *Id.* See also, *Knoxville Teachers Credit Union v. Parkey*, 790 F.2d 490, 491-92 (6th Cir. 1986).

In the present case, Plaintiff argues that the October 2, 2002 check written by Debtor to Plaintiff constitutes a representation regarding Debtor’s financial condition. Plaintiff presumably believes that by including a notation that the check represented the first of five installment payments, Debtor implied that he had the financial wherewithal to make the other payments. Under the *Williams* case, this assertion must fail.

The check made no direct reference (positive or negative) to Debtor’s financial condition. The check served only to direct the drawee bank to pay \$1,000 to Plaintiff and obligated Debtor to make good that amount if the bank dishonored the draft. The notation “first of five installment payments” implies that at the time the check was written, Debtor intended to make additional payments to Plaintiff. The notation does not, on its face, say anything regarding Debtor’s financial condition, i.e. his assets and liabilities or his ability to make future payments to Plaintiff.

Even if the check could be construed as a statement of financial condition, Plaintiff proffers no evidence to indicate that it was published with “intent to deceive” or that Plaintiff’s reliance on the check as a statement of financial condition was reasonable.

Because there are no genuine issues of material fact as to Plaintiff’s § 523(a)(2)(B) claim, summary judgment is granted and Count II of the Complaint is dismissed.

Costs

Defendant failed to appear at the hearing on his Motion for Summary Judgment.

Apparently, Defendant believed the hearing had been adjourned, although there is nothing in the record to support such a belief. Based on Defendant's failure to appear, Plaintiff made an oral motion for costs.

While the court is less than impressed with Counsel for Defendant's standard of practice in this case (service of pleadings by fax, failure to appear at a hearing which had been scheduled in the presence of Counsel), Plaintiff's Motion is denied. Since the Court is issuing a written Opinion, no further appearances are required and Plaintiff has not incurred any additional costs as a result of Counsel's failure to appear on October 11, 2005.

Conclusion

For the reasons set forth above, Defendant's Motion for Summary Judgment is granted and Plaintiff's Complaint is dismissed. No costs or attorney fees are awarded to either party.

Entered: October 13, 2005

/s/ Marci B. McIvor
Marci B. McIvor
United States Bankruptcy Judge